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91-1732

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
v
MARTIN HOWARD SAMMONS,
RESPONDENT

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
v
ALAN MICHAEL STONE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE 6TH AMENDMENT "CONFRONTATION CLAUSE" APPLIES TO PRETRIAL HEARINGS?

2. WHERE TESTIMONY AT A PRETRIAL HEARING SHOWED THAT ONE OR MORE DEFENDANT CHARGED WITH POSSESSING A POUND OF COCAINE WITH INTENT TO DELIVER, AND CONSPIRACY TO DELIVER COCAINE, HAD OFFERED TO PAY TO HAVE AN "INFORMANT" WITNESS KILLED AND A PART OF HIS BODY BROUGHT TO THE DEFENDANT, AND THE TESTIMONY ALSO SHOWED THAT THE DEFENDANTS HAD FORGOTTEN WHAT THE "INFORMANT" LOOKED LIKE, MAY THE TRIAL JUDGE ALLOW THE "INFORMANT" WITNESS TO WEAR A SKI MASK WHILE TESTIFYING AT THE PRETRIAL HEARING SO THAT THE DEFENDANTS AND OTHERS PRESENT IN THE COURTROOM CANNOT SEE THE WITNESS'S FACIAL FEATURES WITHOUT

VIOLATING THE 6TH AMENDMENT'S CONFRONTATION CLAUSE?

3. WHETHER, IN A PROSECUTION FOR POSSESSION WITH INTENT TO DELIVER OVER 225 GRAMS OF A MIXTURE CONTAINING COCAINE, MAY A TRIAL JUDGE, CONSISTENT WITH THE 6TH AMENDMENT'S "CONFRONTATION CLAUSE" AND THE 14TH AMENDMENT'S "DUE PROCESS CLAUSE", PRECLUDE CROSS EXAMINATION AT A PRETRIAL HEARING THAT MIGHT REVEAL THE IDENTITY OF THE WITNESS, WHERE THE DEFENSE HAD BEEN SUPPLIED WITH A LIST OF THE WITNESS'S CRIMINAL CONVICTIONS, AND WHERE THE DEFENSE ATTORNEYS HAD BEEN GIVEN AN OPPORTUNITY TO TALK WITH AND QUESTION THE WITNESS PRIOR TO THE PRETRIAL HEARING, WHERE TESTIMONY SHOWED THAT DEFENDANTS HAD FORGOTTEN WHAT THE WITNESS LOOKED LIKE, AND WHERE THE TRIAL JUDGE CONCLUDED THAT SUCH A

PROCEDURE WAS NECESSARY DUE TO STATEMENTS BY ONE OR MORE DEFENDANT THAT COCAINE WOULD BE PAID TO A PERSON WHO KILLED THE WITNESS AND DELIVERED A BODY PART OF THE WITNESS TO THE DEFENDANT?

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ALAN MICHAEL STONE,
RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

NOW COME the People of the State of Michigan, by George B. Mullison, Prosecuting Attorney for the County of Bay, Martha G. Mettee, Assistant Prosecuting Attorney, Chief of Training and Appeals, and Richard I. Dresser, Assistant Prosecuting Attorney, Director, Career Offender Unit, and pray that a writ of certiorari issue to review the judgments of the Court of Appeals of the State of Michigan entered in the above-entitled matters on October 7, 1991 in People v Sammons, and on October 3,

1991 in People v Stone, leave to appeal denied by the Michigan Supreme Court February 7, 1992 in Sammons, and on January 29, 1992 in Stone.

OPINIONS BELOW

The order of the Michigan Court of Appeals in People v Sammons is a reported opinion at 191 Mich App 351; 478 NW2d 901 (1991) and is appended as Appendix A. The order of the Michigan Supreme Court is reported at 439 Mich 933 (1992), and is appended as Appendix B.

The order of the Michigan Court of Appeals in People v Stone is unreported and is appended as Appendix C. The order of the Michigan Supreme Court is reported at 439 Mich 917 (1992), and is appended as Appendix D.

STATEMENT OF JURISDICTION

Both cases involve identical questions and are joined in a single petition pursuant to Rule 12.2.

The judgments of the Court of Appeals of the State of Michigan were entered in the above-entitled matters on October 7, 1991 in People v Sammons, and on October 3, 1991 in People v Stone. The orders of the Michigan Supreme Court were entered on February 7, 1992 in Sammons, and on January 29, 1992 in Stone.

The jurisdiction of this Court is invoked under 28 USC { 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Fourteenth Amendment: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Both defendants were charged together with a third co-defendant in a joint Information with the crimes of possession with intent to deliver between 226 grams and 650 grams of a mixture containing the controlled substance cocaine and conspiracy to deliver between 226 grams and 650 grams of a mixture containing cocaine. They claimed that they were entrapped.

Michigan follows the minority view of entrapment (the "objective" test), holding that it is a question of law to be determined by the trial court at a pretrial hearing. The burden of proof is on the defendant, and he must prove entrapment by a preponderance of the evidence. The issue of entrapment is not presented to the jury.

A pretrial entrapment hearing was held before the trial court judge, William J. Caprathe. Following the

presentation of proofs by the defendants, the prosecution presented testimony by an informant called "Rick". "Rick" is the person who, in cooperation with the police, made arrangements for the defendants to come to Bay City, Michigan to sell one pound of cocaine for $14,500.00.

When "Rick" was called to testify he came into the courtroom and took the witness stand wearing a ski mask so that his facial features could not be seen. Counsel for the defendants objected, and a hearing was eventually held to determine whether "Rick" should be allowed to wear the mask, and whether the Court should preclude the defense from asking any questions on cross examination that might lead to the discovery of "Rick's" identity. Testimony was presented to show that the defendants did not remember what "Rick" looked like:

> "Q: Officer Buczek, have you overheard comments by the

defendants regarding the identity of the defendant--er, I'm sorry, the identity of the informant?

A: Yes.

Q: And can you tell us what you've overheard in terms of their conversations?

A: Last week, we had a witness from the phone company up here. And when he was seated in the hallway, Mr. Wallace, particularly, took quite a bit of attention - starin' at him; and then once we were in the courtroom, all three of 'em, when I brought the witness in, kept sayin', "Yeah, I think that's him," "That's him," "That looks like him," for quite a bit of time while he was seated in here.

* * *

Q: When Officer Chambers came into the--there came a time when Officer Chambers came into the courtroom later that day; is that correct?

A: Yes.

Q: Were there any comments when Officer Chambers came into the courtroom?

A: Yes.

Q: And what were--what comments were there when Officer Chambers came into the courtroom?

A: The three defendants were again together and they seemed to indicate that Officer Chambers was--

* * *

A: Officer Chambers came in and was seated in the chair by the door. I believe Mr. Stone looked at him and said, "Is that him?" addressing the

> other two defendants. Mr. Sammons said, "I don't know if that's him or not" and he made reference to "I've been clean for five months, I was up for five days the night--"
>
> * * *
>
> A: . . . Mr. Sammons made a comment that he didn't know if that was the informant or not. He said, "It was five months ago, I've been straight for five months; at the time I was up here, I'd been up for five days, I don't know if that's him or not." (E.Hrg., 5-10-88, p. 5-10.)

Testimony was also presented by a second confidential informant who was a prisoner in the Bay County Jail, along with the third co-defendant, James Wallace. (Mr. Wallace's case is not involved in this petition as the Michigan Court of Appeals ruled that he did not

have standing to claim entrapment, and his plea based conviction was affirmed.) According to Informant #2, Wallace called defendant Stone (who was free on bond) from the jail and talked to Stone. Following this conversation, Wallace told Informant #2 that Stone would pay "QP", which means a quarter pound of cocaine, "to have Rick killed and have a part of his body brought to him." In response to a question about what Wallace had told Informant #2 about his conversation with Stone, Informant #2 stated:

> "He said that Rick's testimony wasn't really was - what was hurten' him, that Officer Buczek's was the one he was really more concerned about, not Rick's. But if I had Rick taken care of and brought him his dick, that he would give me the QP any way." (E.Hrg., 5-10-88, p. 127.)

At the conclusion of the hearin relating to the issue of whether "Rick could wear the ski mask while testifying, and whether the defense should be precluded from cross-examining "Rick" in areas that might lead to disclosure of his identity, Judge Caprathe ruled as follows:

> "THE COURT: All right, the Court has given consideration to the arguments and to the testimony and as far as the issue of disclosure of the informant is concerned, I believe that this is a preliminary question and, of course, I'm not sure and I don't think it matters about trying to compare the standards between trial and a motion to suppress. It isn't either actually, it's somewhere in between the two I would say, but the point is I

think that it's a preponderance of the evidence test - preliminary evidentiary question; and it's certainly not a reas--beyond a reasonable doubt test which would be required for a conviction regarding the behavior that's been alleged.

I think you have to take a look at all the factors and then determine whether or not there's a preponderance of the evidence that it would be necessary to preclude the disclosure to deal with the potential adverse safety affect on the witness that's testifying; but is asking to not have his identity disclosed.

You look at the large quantity of drugs that are involved in the charge, the

am--large amount of money, the long potential prison terms, possibly some of it being mandatory depending upon which statutes are applied.

The fact that there is the testimony of the second confidential informant and if you weigh all that on the one hand I think you see a potential safety problem for the witness; on the other side, the need for the information.

Apparently the prosecutor has already shared the record of this individual, and would share any other information which wouldn't result in disclosing the identity such as any work that he's done with the police, that can be done on cross examination and that hasn't been precluded.

The only thing we have precluded were questions that would lead directly to the identity, and thus the safety of the individual; and weighing all of those factors, I -- it would appear to the Court that there is a preponderance of the evidence weighing in favor of not disclosing the witness' identity any further than it already has been and allowing him to complete his testimony with the mask on and limiting the questions to those that do not disclose the actual identity of the individual; but questions such as what he's doing and what he has been doing, or arrangements that have been made and that sort of thing, will have to be asked and unless there's an

> objection that it would disclose identity then they will be permitted and I'll deal with those on an individual question to question basis." (emphasis added) (E.Hrg., 6-7-88, p. 26-28.)

At the conclusion of the entrapment hearing, the court found that the defense had not proven entrapment.

Defendant Sammons was convicted following a jury trial. The informant "Rick" was not called as a witness at trial.

Defendant Stone entered a plea of guilty to the charge of possession with intent to deliver between 226 grams and 650 grams of a mixture containing the controlled substance cocaine. The charge of conspiracy was dismissed.

Both defendants appealed to the Michigan Court of Appeals. That court determined that "the protections afforded

by the Confrontation Clause were available to defendant at the entrapment hearing as a means of ensuring the reliability of the evidence submitted against him." The court also concluded that "Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights." In addition, the court concluded that "it was a violation of defendant's confrontation rights to completely preclude disclosure of identifying information." Accordingly, the court remanded the cases to the trial court for a new entrapment hearing.

The People sought leave to appeal to the Michigan Supreme Court which denied leave, with three of the seven Justices dissenting.

The People now seek certiorari.

REASONS FOR GRANTING THE WRIT

This case is important because it may well have a profound effect upon the government's ability to fight the war against illegal drugs. Due to the nature of drug offenses, it is often necessary to utilize informants, or "cooperating individuals", to infiltrate drug networks or set up transactions. However, due to the large amounts of money involved and the potential for very long prison sentences upon conviction, the lives of the cooperating individuals are sometimes in jeopardy. This case presents one method of dealing with this problem, while still assuring that the rights of the defendants are maintained.

"Rick", a confidential informant, was reluctant to testify due to fear of reprisals, yet, while his testimony was not necessary at trial, it was necessary at a pretrial entrapment hearing, since he was the person who had direct contact

with defendant Sammons in setting up the delivery of a pound of cocaine. (In Michigan, entrapment is a question of law to be decided by the trial court, and it does not become a question for the jury at trial.) Furthermore, the police had become aware of a desire by one or more of the co-defendants to have "Rick" killed. Therefore, it was decided to have "Rick" wear a ski mask during his testimony so that the defendants and others in the courtroom would not be able to see what he looked like. For the same reason the People objected to any cross-examination questions that might lead to determining "Rick's" identity. However, the defense was provided with information relating to "Rick's" criminal history, as well as information relating to any deals made between "Rick" and the police. Furthermore, an opportunity was provided to the defense attorneys to question "Rick" in advance of the entrapment hearing. Only the attorney

for defendant Stone took advantage o this opportunity, and his conversatio with "Rick" was tape recorded by the police so as to preserve it for future use if that became necessary. The fact that "Rick" was not a necessary trial witness is demonstrated by the fact that neither side called him to testify at the trial of defendant Sammons. The People did not need his testimony in order to gain a conviction, and the defense apparently determined that his testimony would not be helpful.

It is the People's position that the right to "confrontation" is a trial right. Barber v Page, 390 US 719; 88 S Ct 1318; 20 L Ed 2d 255 (1968); California v Green, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970); Pennsylvania v Ritchie, 480 US 39; 107 S Ct 989; 94 L Ed 2d 40 (1987). However, we recognize that in Ritchie, only a plurality of the Court agreed with this position, and that in Kentucky v Stincer, 482 US 730; 107 S

Ct 2658; 96 L Ed 2d 631 (1987), Justice Blackmun, writing for the Court, expresses his personal view that the confrontation right "is somewhat broader than that of the Ritchie plurality". Stincer, ftnt 9. In Stincer, the Court chose not to determine whether a hearing held after trial had commenced, but held outside the presence of the jury, to determine whether a child witness was competent to testify was a trial or pretrial proceeding.

The Michigan Court of Appeals felt that:

> "to deny the protections afforded by the Confrontation Clause to a defendant at an entrapment hearing would be to deny him the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent

> trial and conviction, 'is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-Americal criminal proceedings.' Craig [Maryland v Craig] 497 US at ___; 110 S Ct at 3163; 111 L Ed 2d at 678-679. Finally, we believe it would be fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." Sammons, 191 Mich App at 361-362; 478 NW2d at 907.

However, even if the Michigan court is correct in its conclusion that the

Confrontation Clause is applicable to pretrial hearings, the People believe that the court is dead wrong in its conclusion that the defendants' rights were violated!

First, "Rick" did testify at the entrapment hearing, and he was subject to full, complete and rigorous cross examination, subject only to the limitation that questions that might reveal his identity could not be asked. This limited restriction on cross examination was imposed only after the trial judge conducted a hearing and determined that the evidence regarding the threats against the witness's life necessitated such a ruling. Thus, the procedures utilized at the hearing fall with the ambit of the Confrontation Clause:

> "The Court has emphasized that 'a primary interest secured by [the Confrontation Clause] is the right of cross-

> examination.' Douglas v Alabama, 380 US 415, 418; 85 S Ct 1074; 13 L.Ed.2d 934 (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process." Stincer, 482 US at 736; 96 L Ed 2d at 641.

Second, the "face-to-face", "look me in the eyes" aspect of confrontation was present, since "Rick" testified in an open courtroom, in the presence of the three co-defendants. The ski mask did not block the view of the witness. All that was masked were his facial features.

Third, while the Michigan Court of Appeals felt that the inability of the trial court judge to see the face of the witness was a major factor, apparently feeling that credibility cannot be determined without being able to view the witness's facial features, this emphasis

on the need to watch a witness's face is misplaced.

At the entrapment hearing the witness, "Rick", testified in the presence of the defendants, their attorneys, the prosecutor, the judge, and the spectators present in the courtroom. He wore a ski mask that had eye holes. He was able to see and be seen. The only thing that was not visible were his facial features.

While Petitioner recognizes that we all like to see the people we talk to, and that we may think that we can pick up hints regarding whether someone is telling the truth or not from facial expressions, in reality this is not an accurate method of determining credibility. We all know that there are people who can lie with a straight face. We know that there are people who tell the truth, but when nervous they do not look you in the eye when talking. We know that there are people who lie while

they look you straight in the eye. We know that out of nervousness some people laugh or smirk when telling the truth, and other people may laugh or smirk when fabricating. In other words, what does a poker face or any other facial expression mean? No one, not the Michigan Court of Appeals nor the defendants have cited any scientific study or theory which suggests that certain facial expressions mean that a person is telling the truth or telling a lie. Since the meaning of one persons facial expression may or may not be the same as the next person's facial expression, what was lost by allowing the witness to testify while wearing a mask?

In pretrial hearings, or at bench trials, judges are expected to make detailed findings to support their legal conclusions. In order to make the necessary findings, most judges take detailed written notes while witnesses are testifying. It is not possible for a judge to study the facial expressions of

a witness while at the same time taking detailed written notes. Furthermore, the physical arrangement of the courtroom in many instances precludes the judge from studying the facial expressions of witnesses while they testify. In many courtrooms, as was the situation in the instant case, the judge sits slightly above and to the side of the witness. While the judge would be able to see the side of the witness's face, depending on which way the witness was looking, the judge would by no means have a clear view of the witness's entire face.

Furthermore, the view of the Michigan Court of Appeals can be read to preclude blind people, from sitting as jurors or from serving as fact-finders, since blind people would have no way of observing any of the facial features of a witness. Should we tell all of the blind trial court judges around the country that they are not qualified to be judges in a trial court and send them off on full

disability retirement? Should we tell blind lawyers to forget about seeking judicial positions in the trial courts because they are not qualified to judge the credibility of a witness and therefore cannot properly fulfill the role of being a trial court judge? Should we tell the blind citizens of our nation that they are not qualified to fulfill one of the most solemn roles a citizen can be asked to perform, that of a juror? Finally, should we tell the blind criminal defendant that he or she has a right to be tried by a jury of his or her peers, so long as they are not peers who are blind? A reading of the decision of the Michigan Court of Appeals would require an affirmative answer to each of these questions!!

The reasons for seeking review of the decision of the Michigan Court of Appeals are perhaps best phrased by Michigan Supreme Court Justice Patricia Boyle in her dissent from the denial of leave to appeal to the Michigan Supreme Court:

"I dissent from the order and would grant leave to appeal to determine whether the masking of a witness who testified under oath, in defendant's presence and subject to cross examination violated defendant's right to confrontation where it is clear that the identity of the witness was known to the defendant since defendant claimed entrapment by the witness. The Court of Appeals concluded that the Confrontation Clause applies fully to an entrapment hearing despite the irreducible literal meaning of the clause: "'a right to meet fact to face all those who appear and give evidence at trial, " Coy v Iowa, 487 US 1012, 1016 (1988), quoting California v

Green, 399 US 149, 175 (1970)(Harlan J., concurring).

Moreover, it is well established that the Confrontation Clause reflects a preference for face-to-face confrontation, and thus a defendant's right physically to face those who testify against him is not absolute, even when it encompasses the irreducible literal meaning of the clause, Green, supra; Dutton v Evans, 400 US 74 (1970); Bourjaily v United States, 483 US 171 (1987). As the Supreme Court observed in Maryland v Craig, 497 US ___; 110 S Ct 3157, 3165; 111 L Ed 2d 666 (1990):

'Given our hearsay cases, the word 'confront,' as used in the Confrontation Clause, cannot simply mean

face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant--a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial.'

To be sure, the elements of face-to-face confrontation encompass oath, cross-examination, and observation of the witnesses' demeanor. The Court in Craig, however, upheld a procedure which preserved all of the other elements of the right, but prevented a child witness from seeing the defendant as the witness testified at trial. The test is whether the procedure employed 'adequately

ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.' Maryland v Craig, supra, 110 S Ct 3166.

In the instant case, assuming that the entrapment hearing was a trial for purposes of confrontation analysis, see Kentucky v Stincer, 482 US 730 (1987), the only element of Confrontation Clause analysis that the procedure had an effect on was the trial court's ability to see the face of the witness. Defendant was present, the witness was subjected to cross-examination under oath, and there was confrontation in

the literal sense. The opinion of the Court of Appeals is published and may have significant consequences for the protection of informant witnesses, as well as for the development of other innovative procedures which the state is able to demonstrate are necessary to further an important state interest." (emphasis added)

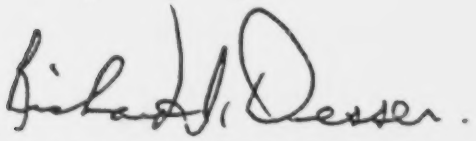
CONCLUSION

WHEREFORE, the Petitioner requests that plenary review be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN HOWARD SAMMONS,

Defendant-Appellant.

October 7, 1991
9:10 a.m.

No. 115051

Before: MacKenzie, P.J., and Reilly and Connor, JJ.

REILLY, J.

Defendant was convicted by a jury of possession with intent to deliver 225 grams or more, but less than and (sic) 650 grams, of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine, MCL 750.157a; MSA 28.354(1). On September 6, 1988, defendant was sentenced to a term of twenty to thirty years of imprisonment for each offense, to be served consecutively. On March 27, 1989, this

Court granted the defendant's application for a delayed appeal. We remand for proceedings consistent with this opinion.

At trial, Officer Buczek of the Bay City Police Department testified that on December 4, 1987, he and a police informant went to the Imperial Hotel in Bay City, Michigan, for the purpose of buying one pound of cocaine. Buczek and the informant were admitted into a hotel room by defendant, who was accompanied by codefendants Alan Stone and James Wallace. Defendant told the informant that the "shit" was in the bathroom. While the defendant and the informant went into the bathroom, Buczek remained in the room with Stone and Wallace, who discussed the problems associated with obtaining such a large quantity of cocaine. After defendant and the informant came out of the bathroom, defendant gave the informant a "sample" from a small pile on a night stand. The informant tasted the sample and indicated

that it was "good." Buczek then told defendant the money was in the car. Defendant pointed to Stone and said, "[H]e's the money man." Stone told Buczek to get the money, which he did. Defendant commented that he hoped the bills were not little. After Stone counted the money, Wallace went outside to get "the product." Defendant told Buczek "[W]e don't like to keep the coke and the money in the room at the same time."

After Wallace left the room, other police officers arrived and the suspects were arrested. Wallace was arrested after entering a van parked outside the hotel room. A warrant was secured to search the van, and the police discovered a sealed package under one of the seats. This package, along with the material from the night stand, and a packet that was seized from Stone were turned over to the Michigan State Police for testing. Analysis of the materials indicated that

all three contained cocaine. Defendant, Wallace, and Stone were all charged with conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine, and possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine.[1]

Defendant, along with Wallace and Stone, raised the issue of entrapment before trial, and extensive hearings were conducted from May 4, 1988, through June 7, 1988. Defendant testified and identified the informant who accompanied Officer Buczek during the drug sale as a person he knew merely as "Rick." Defendant claimed that Rick set up the drug sale and pressured him into participating. The prosecution called Rick to rebut the defendant's allegations. Over defendant's objection, Rick was permitted to testify while wearing a mask and without disclosing his true identity. Rick denied either pressuring or threatening defendant, and the trial court found no entrapment.

Codefendants Wallace and Stone eventually pleaded guilty of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine in exchange for the dismissal of the remaining charges against them. The defendant, however, declined a similar plea offer, electing instead to go to trial. At the subsequent trial, Rick was not called as a witness. Following trial, defendant was convicted by a jury of both counts as charged. This appeal followed.

Defendant on appeal has raised a host of issues addressing pretrial procedure, trial procedure, and sentencing. We will review each of them.

I

The first issue we have been asked to decide is whether the defendant's Sixth Amendment right of confrontation was violated when the trial court permitted Rick, the prosecution's chief witness, to testify at the entrapment

hearing while wearing a mask, and without disclosing his true identity.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, Pointer v Texas, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965), guarantees to a criminal defendant the right, "[i]n all criminal prosecutions, . . . to be confronted with the witnesses against him." The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. Maryland v Craig, 497 US __; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

A

At the entrapment hearing, defendant testified that he first met Rick at a "dope house" approximately eight months before he was arrested. Defendant claimed that until November 16,

1987, he saw Rick about once a week at various dope houses where they would "do" cocaine together. Beginning on November 16, defendant said Rick began telephoning him repeatedly, up to ten times a day, trying to persuade him to sell cocaine. At first Rick asked for two ounces, and then a pound. Defendant said he kept trying to put Rick off and told him that he didn't want to sell cocaine. Rick kept calling though, telling defendant that he had spent $1,500 "profit money," and that his people were "putting the heat on him." Further, defendant was told that if he did not help out, Rick would have his people "put the heat" on defendant. Defendant said he finally agreed to help because Rick was desperate and in trouble. Defendant said that although he was a cocaine addict, and knew people who "turn dope," he was not a drug dealer.

Defendant's sister corroborated defendant's testimony, claiming that Rick

called approximately seventy times during the last two weeks in November 1987. She said Rick called one time "hollerin'" that his people were upset because defendant had not shown up with two ounces of cocaine. He told her that defendant "better come through or else."

In rebuttal, the prosecution called Rick as a witness. At the prosecutor's request, and over defendant's objection, Rick was permitted to testify while wearing a mask, and defense counsel was instructed that he could not ask any identifying questions of Rick. The court, however, did allow admission of Rick's criminal record, but with identifying information struck therefrom. The justification for these procedures was that either defendant or one of his codefendants had allegedly offered someone a quarter pound of cocaine to kill Rick.[2]

According to Rick, beginning in October 1987, he and a friend made

several trips from Bay City to Detroit where they bought drugs from defendant's younger brother and then defendant. In mid-November, after Rick's fifth trip to Detroit, the police searched Rick's house and discovered cocaine. Although Rick was not arrested, he was given a card with a phone number to call at the police department if he wanted help with his "situation." Consequently, Rick contacted the police and volunteered to assist them in catching his suppliers. Rick said he called both defendant and another source, identified as "Jim," about arranging a delivery of two ounces of cocaine to Bay City. Although Rick thought defendant and Jim were working together, Jim delivered the drugs in late November without defendant. Rick then called defendant to arrange for a sale of one pound of cocaine. Rick said he made numerous telephone calls to arrange the deal.

According to Rick, there was never any resistance by defendant to the sale, and he never put any pressure on defendant, whether by threats or appeals for his own safety. Rick said he was in constant contact with the police and discussed each phone call with them. Officer Buczek testified that Rick was closely supervised through the use of in-person meetings and phone consultations. Although Rick testified that he was not promised anything for his cooperation, the prosecutor eventually stipulated that Rick was told that the police would inform the prosecutor of his cooperation, and that the more help he provided, the more they "could talk."

At the conclusion of the entrapment hearing, the trial court made extensive findings, reflecting acceptance of the testimony of Rick and the police. The court found that defendant had sold drugs to Rick before Rick's involvement with the police, that defendant had indicated

a willingness to deliver drugs to Bay City, that there was no improper inducement of Rick's cooperation and no improper pressuring of defendant, and that Rick had been adequately supervised. Thus, the court concluded that there had been no entrapment.

B

Defendant now argues, as he did below, that his Sixth Amendment right of confrontation was violated through the use of the mask because he was prevented from confronting his accuser face-to-face and because the trial judge, as the trier of fact, was prevented from adequately assessing the witness' credibility, a major issue in the entrapment hearing. Defendant also argues that his right of confrontation was violated when the trial court precluded cross-examination regarding identifying information.

The prosecution claims that the masking of its chief witness and the withholding of identifying information

did not violate the Confrontation Clause because an entrapment hearing is not a trial involving the ultimate issue of guilt or innocence.

In Michigan, the issue of entrapment is decided by the trial court, after a separate evidentiary hearing, rather than by a jury.[3] People v Jamieson, 436 Mich 61, 80; 461 NW2d 884 (1990); People v D'Angelo, 401 Mich 167, 176-177; 257 NW2d 655 (1977).

In D'Angelo, at 176, our Supreme Court explained that such a procedure does not violate a defendant's Sixth Amendment right to a jury trial:

> A court determination of entrapment does not deprive the defendant of the Sixth Amendment right to trial by jury. The focus of the entrapment inquiry under the objective test is upon the nature of the police conduct. The guilt or innocence of the defendant is irrelevant to that

> determination. A decision whether entrapment has occurred will involve the court's evaluation of the government conduct which resulted in the charges against the defendant. Should the court determine that the government did not engage in impermissible conduct, the guilt or innocence of the defendant will be decided by the jury.

Moreover, because a defendant who asserts an entrapment claim occupies an accusatorial posture, the burden of proving the charge properly may be placed on the defendant. Id. at 180.

However, in Kentucky v Stincer, 482 US 730; 107 S Ct 2658; 96 L Ed 2d 631 (1987), the United States Supreme Court considered a prosecutor's contention that the protections afforded by the Confrontation Clause could not extend to a pretrial hearing. In that case, the defendant argued that his exclusion from

the hearing to determine the competency of child witnesses violated his Sixth Amendment confrontation rights. Noting that the defendant was permitted under Kentucky law to move for reconsideration of the competency determination after the child witnesses testified at trial, the Supreme Court found that the defendant's rights under the Confrontation Clause had not been violated, given the opportunity for full and effective cross-examination during trial as a means of establishing non-competency to testify, as well as undermining credibility. Id. at 743-744.

We do not believe that the irrelevance of a defendant's guilt or innocence in resolving an entrapment claim renders the protections afforded by the Confrontation Clause inapplicable to an entrapment hearing. As we have already noted, the central concern of the Confrontation Clause is to ensure the reliability of evidence by subjecting it to rigorous testing in the context of an

adversary proceeding before the trier of fact. Craig, supra. While an entrapment hearing may not be a criminal prosecution involving the assessment of guilt or innocence, it remains, like a criminal trial, adversarial in nature and requires the resolution of factual issues by a trier of fact. Like at a trial, evidence is presented and testimony given.

We believe the interests involved in ensuring the reliability of evidence at a trial also apply to an entrapment hearing. Indeed, a defendant who claims entrapment, because he essentially concedes commission of the offense charged, is likely to view resolution of the entrapment issue more critically than he views a trial of his guilt or innocence. Further, unlike the situation in Stincer, a defendant in Michigan may not renew the entrapment issue at trial. Thus, to deny the protections afforded by the Confrontation Clause to a defendant at an entrapment hearing would be to deny

him the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent trial and conviction, "is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Craig, 111 L Ed 2d 678-679. Finally, we believe it would be fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence.

Accordingly, for the foregoing reasons, we conclude that the protections afforded by the Confrontation Clause were available to defendant at the entrapment hearing as a means of ensuring the reliability of evidence submitted against him.

C

We must now decide whether defendant's confrontation rights were violated by the procedures employed at the entrapment hearing.

The United States Supreme Court has emphasized a defendant's right under the Confrontation Clause to a face-to-face meeting with witnesses appearing before the trier of fact. Coy v Iowa, 487 US 1012, 1016; 108 S Ct 2798; 101 L Ed 2d 857 (1988). The symbolic purposes served by such an encounter are explained in Coy, at 1017-1019:

> [T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." . . .
>
> . . . A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting

> or mistaking the facts." . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. [Citations omitted.]

Thus, in Coy, the Supreme Court held that a defendant's right to a face-to-face confrontation was violated where a large screen was placed between the testifying witness and the defendant.

In Craig, however, decided after Coy, the Supreme Court reaffirmed the importance of face-to-face confrontation, but held that it was not an indispensable element of the right to confront one's accusers. Craig, 111 L Ed 2d 681. The Court held that the "preference" for face-to-face confrontation must occasionally give way to considerations of public policy and the necessities of the case. Id. Therefore, when necessary to further an important state interest,

"the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 686.

Thus, in Craig, the Supreme Court held that the defendant's confrontation rights were not violated in a child sexual abuse case where the child victim was permitted to testify outside the defendant's physical presence by one-way closed circuit television. The Court found that an important state interest was involved (protection of a child witness from trauma caused by testifying in the physical presence of the defendant), while also noting that the procedure employed preserved other important elements of the confrontation right, i.e., oath, cross-examination, and observance of the witness' demeanor. Id. at 682.

In the present case, the prosecution's chief witness was permitted to testify while wearing a mask that covered both his face and head.[4] Like the presence of a screen in Coy, a full-face mask tends to diminish the aspect of personalization associated with testifying about a defendant "to his face." Thus, it may very well make a witness "feel quite differently" than when he has to repeat his story while looking at the defendant. Moreover, to the extent that facts are distorted, they may be discerned more easily in a face-to-face confrontation.

It is suggested that the presence of threats against the witness justified the masking procedure in order to further an important state interest in promoting the safety of witnesses. We do not doubt that a state has a valid interest in promoting the safety of witnesses at criminal proceedings. Further, we agree that a trial court generally would be

justified in taking certain protective measures where evidence of threats or other reasonable concerns for a witness' safety are present. However, as Craig instructs us, the Confrontation Clause requires that any procedures devised to protect a witness must be tailored to preserve the essence of effective confrontation by ensuring the reliability of evidence in the face of rigorous adversarial testing.

As noted above, the procedure used in Craig (testimony by closed circuit television) was found to be adequate even though the witness did not have to testify while facing the accused, because it preserved other important elements of confrontation, i.e. oath, cross-examination, and observance of the witness' demeanor. In this case, however, while the presence of the mask appears to have allowed the witness to observe the defendant, it foreclosed the opportunity for the trier of fact to

adequately asses the witness' credibility through observation of demeanor.

In one of its earliest cases interpreting the Confrontation Clause, the Supreme Court noted that a primary object of the Confrontation Clause was to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v United States, 156 US 237, 242-243; 15 S Ct 337; 39 L Ed 409 (1895).

Indeed, our own Supreme Court also has recognized the importance of demeanor evidence:

> Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication

> to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. [People v Dye, 431 Mich 58, 65; 427 NW2d 501 (1988).]

Moreover, as observed in United States v Walker, 772 F2d 1172, 1179 (CA 5, 1985), "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words."

Here, there is no doubt that credibility was the major issue at the entrapment hearing. The defendant's testimony tended to show that he agreed to the drug sale only after being repeatedly pressured with persistent telephone calls, threats, and appeals to his sympathy and friendship. Such allegations, standing alone, were sufficient to establish entrapment. See Jamieson, supra at 89. Through its masked witness, however, the prosecution was able to refute each of the

defendant's allegations. Ultimately, the trial judge accepted the testimony of the masked witness over that of defendant in concluding that there had been no entrapment.

Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights. Craig, supra.

D

We also find that it was a violation of defendant's confrontation rights to completely preclude disclosure of identifying information.

The ability to identify and "place" one's accusers has been recognized as an important aspect of confrontation. In Smith v Illinois, 390 US 129; 88 S Ct 748; 19 L Ed 2d 956 (1968), the United States Supreme Court reversed the

conviction of a defendant accused of illegally selling narcotics when he was prevented from cross-examining the principal prosecution witness regarding his name or where he lived. The Supreme Court stated:

> [W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. [Id. at 131.]

Also see Alford v United States, 282 US 687; 51 S Ct 218; 75 L Ed 624 (1931).

Trial courts do, however, have discretion to place limits on cross-examination where questions are intended merely to harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness. See People v Paduchoski, 50 Mich App 434, 438; 213 NW2d 602 (1973).

In People v Pleasant, 69 Mich App 322; 244 NW2d 464 (1976), this Court discussed the underlying concerns relative to limiting cross-examination regarding identifying information, including the extent to which limitations can be imposed. Adopting the reasoning of the United States Court of Appeals for the Fifth Circuit in United States v Alston, 460 F2d 48 (CA 5, 1972), this Court held that the prejudice to be protected against is the prejudice resulting from a denial of the opportunity for the defendant to "place the witness in his proper setting."

Pleasant, supra at 327. Accordingly, reversal for failure to disclose certain identifying information will not be required under Smith or Alford, supra, where there is both sufficient reason for nondisclosure and the defendant is possessed of sufficient other information with which to place the witness in his proper setting, thus testing his credibility. Pleasant, supra at 327-328.

Here, while we agree that the trial court would have been justified in limiting cross-examination regarding identifying information in light of the alleged threats, it instead precluded all such cross-examination altogether. Moreover, while we note that defendant's testimony does suggest some familiarity with the witness' background, the trial court failed to make any findings regarding what information defendant possessed or whether defendant possessed sufficient information with which to "place the witness in his proper setting"

so as to enable further testing of credibility. Pleasant, supra. Absent such findings, the trial court's total foreclosure of identifying information "effectively emasculated" defendant's right of cross-examination. Smith, supra.

We reject the prosecution's claim that it was entitled to withhold the identity of its chief witness under the so called "informer's privilege." As explained in Roviaro v United States, 353 US 53, 59; 77 S Ct 623; 1 L Ed 2d 639 (1957), this privilege entitles the Government to preserve the anonymity of citizens who have furnished information concerning violations of the law to law enforcement officers, thus encouraging them to communicate such knowledge to the police. Even then, however, the privilege is not absolute:

> The scope of this privilege is limited by its underlying purpose.
>
> . . .

> . . . Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. [Id. at 60-61.]

In the present case, the prosecution's witness was an actual participant in the underlying transaction, rather than a mere supplier of information. Moreover, his testimony was essential to a fair determination of the issue of entrapment. Thus, the informer's privilege does not apply.

E

In sum, we conclude that the masking of the prosecution's chief witness, as well as the complete

prohibition of disclosure of identifying information, violated the defendant's rights of confrontation. Accordingly, we hold that defendant is entitled to a new entrapment hearing, consistent with this opinion.

Despite our resolution of the entrapment issue, we still find it necessary to review the defendant's remaining issues on appeal.

II

Defendant argues that the trial court abused its discretion when it refused to accept his pretrial offer to plead nolo contendere to the charge of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine. We disagree.

On June 23, 1988, defendant appeared before the trial court in connection with the prosecutor's offer to dismiss the conspiracy charge in exchange for a plea of guilty of the charge of possession with intent to deliver 225

grams or more, but less than 650 grams, of cocaine. Contrary to the prosecutor's offer, however, defendant insisted on pleading nolo contendere rather than guilty. When the prosecutor would not agree to such a plea, defendant elected to go to trial on both charges.[5]

Acceptance of a nolo contendere plea is a matter of grace, not of right. People v Lakin, 52 Mich App 437, 440; 217 NW2d 452 (1974). A defendant may enter a plea of nolo contendere only with the court's consent. MCR 6.301(B), formerly MCR 6.101(F). In this case, while the trial court had the discretion to accept a plea of nolo contendere to the charged offense of possession with intent to deliver 225 grams or more, but less than 650 grams of cocaine, Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974), it did not have the authority to accept such a plea, over the prosecutor's objection, in exchange for the dismissal of the conspiracy charge.

People v Heiler, 79 Mich App 714, 718; 262 NW2d 890 (1977). Accordingly, we find no error.

III

We now turn to consideration of defendant's trial-related issues.

First, with regard to the charge of possession with intent to deliver cocaine, the jury was instructed that it could find defendant guilty either as a principal or as an aider and abettor. Defendant contends that the evidence was insufficient to support a finding of guilt under one or both of these theories and argues, therefore, that the jury's failure to specify on which of the two theories its decision was based requires reversal. See People v Acosta, 153 Mich App 504, 510; 396 NW2d 463 (1986), citing People v Gilbert, 55 Mich App 168, 174; 222 NW2d 305 (1974).

In reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to

the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. People v Petrella, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

In this case, defendant argues that the evidence was insufficient to prove the element of possession, i.e., that he either possessed the cocaine or aided and abetted in its possession. We disagree.

Possession may be either actual or constructive, and may be joint as well as exclusive. People v Hill, 433 Mich 464, 470; 446 NW2d 140 (1989); People v Richardson, 139 Mich App 622, 625; 362 NW2d 853 (1984). Constructive possession may be found where a defendant knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another, or if there is proximity to the substance together with indicia of control. Hill, supra. Circumstantial evidence and

reasonable inferences arising from the evidence are sufficient to establish possession. Richardson, supra.

The evidence presented at trial showed that defendant provided Officer Buczek with a sample of cocaine, participated in discussions regarding future sales, expressed interest in the denomination of the bills used to purchase the drugs, and told Officer Buczek that "we" do not like to keep the drugs and money in the room at the same time. When viewed in a light most favorable to the prosecution, there was sufficient evidence of both knowledge and indicia of control to enable the jury to find that defendant directly committed the crime of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine.

We also find that the evidence was sufficient to convict defendant under an aiding and abetting theory. To aid and abet possession, there must be criminal

intent and direct or indirect acts or encouragement which aid that perpetration of the crime. People v Doemer, 35 Mich App 149, 152; 192 NW2d 330 (1971). The act or encouragement must be done knowingly with the intent to aid the possessor in obtaining or retaining possession. Id. In this case, although Stone was described as the "money man" and Wallace the person who left to get the drugs, defendant was the one who met Officer Buczek at the door, told the informant that the drugs were in the bathroom when they were not, and told Officer Buczek that they did not like to have the drugs and money in the room at the same time. A jury properly could infer from this evidence that defendant was acting to protect the possession of the drugs by his confederates and that his actions aided and assisted in the commission of the crime.

Accordingly, because the evidence was sufficient to support a finding of

guilt under each of the alternative theories, reversal is not required. Acosta, supra at 513.

Next, defendant argues that he was denied a fair trial because of instructional error. We disagree.

Although the trial court's instruction regarding reasonable doubt omitted the "moral certainty" language contained in former CJI 3:1:04 and CJI 3:1:05, the instruction was virtually identical to CJI2d 3.2(3), which no longer requires the "moral certainty" language. Read in its entirety, the instruction adequately presented the concept of reasonable doubt to the jury. See People v Jackson, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).

Defendant also contends that instructional error occurred because the trial court failed to define the term "possession" for the jury. However, defendant did not request such an instruction at trial, and the absence of

such an instruction did not result in manifest injustice. Therefore, this issue has not been preserved for appeal. People v Kelly, 423 Mich 261, 272; 378 NW2d 365 (1985). Further, we find that the failure to request an instruction defining possession did not constitute ineffective assistance of counsel. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Finally, the fact that defendant was not permitted to present his entrapment defense to the jury does not entitle him to reversal of his convictions. As noted previously, the issue of entrapment is decided in Michigan by the trial court in the jury's absence; a defendant is not then entitled to a "second bite at the apple" enabling the jury to second-guess the trial court's determination. D'Angelo, supra at 178.

IV

Next, defendant contends that the imposition of consecutive sentences for convictions of possession with intent to deliver cocaine and conspiracy to deliver the same cocaine violates the constitutional prohibitions against double jeopardy[6] and is contrary to the intent of the Legislature. Defendant further argues that his statutorily mandated twenty- to thirty-year prison terms constitute cruel and unusual punishment.

Among the protections afforded by the Fifth Amendment guarantee against double jeopardy is the protection against multiple punishment for the "same offense." People v Sturgis, 427 Mich 392, 398; 397 NW2d 783 (1986). This protection is designed to ensure that courts confine their sentences within the limits established by the Legislature. Id. at 399. While the term "same offense" applies to overlapping conduct

that violates more than one statute, the scope of double jeopardy protection against imposed multiple punishment for the same offense is confined to a determination of legislative intent. Id. at 399-400.

In People v Robideau, 419 Mich 458, 487; 355 NW2d 592 (1984), our Supreme Court identified some of the considerations relevant to a determination of legislative intent:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent . . .
>
> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one

another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes.

While the controlled substance provisions of the Public Health Code are designed to protect society from the "patently harmful" effects of drug trafficking, see People v Gorgon, 121 Mich App 203, 206-207; 328 NW2d 619 (1982), the purpose of the conspiracy statute is to protect society from the "increased and special danger to society presented by group as opposed to individual activity." People v Carter, 415 Mich 558, 569-570; 330 NW2d 314 (1982). Thus, distinct social norms are involved. Further, the conspiracy statute, MCL 750.157a; MSA 28.354(1), provides for punishment equal to the

substantive crime; it does not impose a hierarchical, harsher penalty based upon the presence of aggravating factors. Additionally, in Carter, supra at 569, our Supreme Court stated:

> It is a settled principle of black-letter law that conspiracy is a crime that is separate and distinct from the substantive crime that is its object. LaFave & Scott, Criminal Law, Section 62, p 494; People v Tinskey, 394 Mich 108; 228 NW2d 782 (1975); People v Chambers, 279 Mich 73; 271 NW 556 (1937). The guilt or innocence of a conspirator does not depend upon the accomplishment of the goals of the conspiracy . . . . Thus, a defendant may be convicted and punished for both the conspiracy and the substantive crime. Pinkerton v United States, 328 US 640; 66 S Ct 1180; 90 L Ed 1489 (1946).

In light of the foregoing, we conclude that separate convictions and punishment for possession with intent to deliver cocaine and conspiracy to deliver cocaine do not violate double jeopardy protections. See also People v Velasquez, 125 Mich App 1, 3-4; 335 NW2d 705 (1983).

We also disagree with defendant's claim that the Legislature did not intend for separate punishments to be imposed consecutively. The express language of MCL 333.7401(3); MSA 14.15(7401)(3), pursuant to which consecutive sentencing was ordered, provides that "[a] term of imprisonment imposed pursuant to subsection (2)(a) . . . shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." We reject defendant's contention that this statute is ambiguous. See People v Mamon, 190 Mich App 124; __ NW2d __ (1991). Rather, pursuant to the plain language of the

statute, defendant's sentence for the separate and distinct felony offense of conspiracy was required to be consecutive.

Finally, defendant argues that the mandatory twenty- to thirty-year sentences required by MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), in effect at the time defendant committed the instant offenses, constitute cruel and unusual punishment. While we reject defendant's cruel and unusual punishment argument, People v Marji, 180 Mich App 525, 542-543; 447 NW2d 835 (1989), we nevertheless vacate defendant's sentences, and in the event his convictions are affirmed on remand, we direct that he be resentenced under the amended sentencing provisions of the Public Health Code pursuant to People v Schultz, 435 Mich 517; 460 NW2d 505 (1990).[7]

V

In conclusion, we hold that defendant is entitled to a new entrapment hearing consistent with this opinion. We remand for this purpose. However, because defendant's jury convictions were properly obtained, these convictions shall be affirmed on remand if, after a new entrapment hearing, the trial court determines that defendant was not entrapped. In this event, defendant shall be resentenced in accordance with Schultz, supra. If, however, a new entrapment hearing is not held, or if the trial court determines after a hearing that defendant was entrapped, his convictions shall be reversed and the charges dismissed.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ Barbara B. MacKenzie

/s/ Michael J. Connor

[1]Codefendant Stone also was charged with possession of less than fifty grams of cocaine. Additional charges of possession of less than fifty grams of cocaine, carrying a concealed weapon, and possession of a firearm during the commission of a felony also were filed against codefendant Wallace.

[2]A second confidential informant, who also was permitted to testify while wearing a mask, testified regarding the alleged threat. The witness claimed that while he was in jail with codefendant Wallace, he told Wallace that he knew Rick. After Wallace contacted codefendant Stone with this information, Wallace told the witness he would give him a quarter pound of cocaine if he had Rick "taken care of" and brought him a body part. The witness then contacted Stone to verify this information, and Stone told him, "You bring me his dick, you got a QP. I got it right here."

[3]This is contrary to the procedure of the federal system which, unlike Michigan, adheres to the subjective theory of entrapment, and allows the issue to be raised at trial and presented to the jury.

[4] Defense Counsel: I ask the record to reflect also that the witness is wearing a ski mask or some type of mask where his face and head are not visible.

The Prosecutor: That's correct.

The Court: It may so show.

[5] Defendant: Yes, I wanta plea [sic] nolo contendere.

The Court: Or else you'd rather go to trial.

Defendant: Trial, yes.

The Court: All right, then the prosecution doesn't wish to make that offer, so then we're left with no other choice than but to go to trial. Is that your desire.

Defendant: Yes. Yes.

[6]US Const Ams V, XIV; Const 1963, art 1, Section 15.

[7]Judges REILLY and MACKENZIE do not believe that Schultz constitutes binding precedent, inasmuch as only three members of the Supreme Court agreed on the basis for decision. People v Anderson, 389 Mich 155, 170; 205 NW2d 461 (1973). Further, they agree with the reasoning of the dissenters in Schultz, and thus, they do not believe that defendant is entitled to be resentenced pursuant to the amended version of Section 7401. Nevertheless, Judges REILLY and MACKENZIE acknowledge that, since Schultz was decided, the Supreme Court, in lieu of granting leave to appeal, has repeatedly vacated rulings of this Court and remanded for resentencing in accordance with Schultz. See People v Hamp, 437 Mich 865; 462 NW2d

589 (1990), and other cases reported at 437 Mich 865-867. Accordingly, in the interests of fairness and judicial economy, Judges REILLY and MACKENZIE reluctantly concur in the decision to grant resentencing in accordance with Schultz.

APPENDIX B

MICHIGAN SUPREME COURT

ORDER
Entered: February 7, 1992

92641 & (63)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
Cross-Appellee,

v

MARTIN SAMMONS,

SC: 92641
COA: 115051
LC: 87-1554

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., states as follows:

I dissent from the order and would grant leave to appeal to determine whether the masking of a witness who testified under oath, in defendant's presence and subject to cross-examination violated defendant's right to confrontation where it is clear that the

identity of the witness was known to the defendant since defendant claimed entrapment by the witness. The Court of Appeals concluded that the Confrontation Clause applies fully to an entrapment hearing despite the irreducible literal meaning of the clause: "'a right to meet face to face all those who appear and give evidence at trial,'" Coy v Iowa, 487 US 1012, 1016 (1988), quoting California v Green, 399 US 149, 175 (1970) (Harlan J., concurring).

Moreover, it is well established that the Confrontation Clause reflects a preference for face-to-face confrontation, and thus a defendant's right physically to face those who testify against him is not absolute, even when it encompasses the irreducible literal meaning of the clause, Green, supra; Dutton v Evans, 400 US 74 (1970); Bourjaily v United States, 483 US 171 (1987). As the Supreme Court observed in Maryland v Craig, 497 US ___; 110 S Ct 3157, 3165; 111 L Ed 2d 666 (1990):

"Given our hearsay cases, the word 'confront,' as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant--a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial."

To be sure, the elements of face-to-face confrontation encompass oath, cross-examination, and observation of the witnesses' demeanor. The Court in Craig, however, upheld a procedure which preserved all of the other elements of the right, but prevented a child witness from seeing the defendant as the witness testified at trial. The test is whether the procedure employed "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded

live, in-person testimony." Maryland v Craig, supra, 110 S Ct 3166.

In the instant case, assuming that the entrapment hearing was a trial for purposes of confrontation analysis, see Kentucky v Stincer, 482 US 730 (1987), the only element of Confrontation Clause analysis that the procedure had an effect on was the trial court's ability to see the face of the witness. Defendant was present, the witness was subjected to cross-examination under oath, and there was confrontation in the literal sense. The opinion of the Court of Appeals is published and may have significant consequences for the protection of informant witnesses, as well as for the development of other innovative procedures which the state is able to demonstrate are necessary to further an important state interest.

Brickley and Riley, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

February 7, 1992 /s/ Corbin R. Davis
Clerk

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN MICHAEL STONE,

Defendant-Appellant.

October 3, 1991

No. 111978

Before: MacKenzie, P.J., and Reilly and Connor, JJ.

PER CURIAM.

Defendant pled guilty to possession with intent to deliver between 225 and 650 grams of cocaine. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant tendered his plea pursuant to a plea bargain arrangement wherein additional counts of conspiracy to deliver cocaine, and possession of less than fifty grams of cocaine were dismissed. In addition, defendant preserved his right to appeal an adverse trial court ruling on his claim of entrapment. Defendant was

sentenced to a mandatory term of twenty to thirty years of imprisonment. Defendant appeals as of right. We remand for proceedings consistent with this opinion.

Defendant's conviction resulted from his participation, along with codefendants Martin Sammons and James Wallace, in the same December 4, 1987, drug transaction reported in People v Sammons, __ Mich App __; __ NW2d (Docket No. 115051, rel'd __/__/91).

Defendant, Sammons, and Wallace all participated in a joint entrapment hearing in connection with their individual claims of entrapment. Like the defendant in Sammons, defendant Stone testified that a police agent informant, identified merely as "Rick," repeatedly contacted him, trying to persuade him to sell cocaine. Defendant said he declined several times, but that Rick kept calling both him and Sammons anyway. According to defendant, he finally agreed to help

Rick because of the persistent pressure from Rick and Sammons, and because of Rick's threat to "come down on all of us" if he did not cooperate. Rick was called as a witness by the prosecution. He denied pressuring or threatening either defendant or Sammons.

Consistent with our holding in Sammons, supra, we find that defendant's constitutional rights to confrontation were violated when "Rick," the prosecution's chief witness, was permitted to testify while wearing a mask, and without having to disclose his true identity. Moreover, because we find that defendant's allegations, in the absence of competent testimony to the contrary, were sufficient to establish entrapment, we conclude that defendant is entitled to a new entrapment hearing. Sammons, supra. Accordingly, we remand for this purpose.

If, following a new entrapment hearing, the trial court determines the

defendant was not entrapped, defendant's plea-based conviction shall be affirmed. If, however, a new entrapment hearing is not held, or if the trial court determines after a hearing that defendant was entrapped, his conviction shall be reversed and all charges dismissed.

We also vacate defendant's sentence, and, in the event defendant's conviction is affirmed on remand, he shall be resentenced pursuant to People v Schultz, 435 Mich 517; 460 NW2d 505 (1990).[1] We reject, however, defendant's claim that a mandatory term of twenty to thirty years of imprisonment for possession with intent to deliver between 225 and 650 grams of cocaine constitutes cruel and unusual punishment. People v Marji, 180 Mich App 525, 542-543; 447 NW2d 835 (1989). See also Harmelin v Michigan, 501 US __; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

Remanded for proceedings consistent

with this opinion. We do not retain jurisdiction.

/s/ Barabara B. MacKenzie
/s/ Maureen Pulte Reilly
/s/ Michael J. Connor

[1] Judges Reilly and MacKenzie do not believe that Schultz constitutes binding precedent, inasmuch as only three members of the Supreme Court agreed on the basis for decision. People v Anderson, 389 Mich 155, 170; 205 NW2d 461 (1973). Further, they agree with the reasoning of the dissenters in Schultz, and thus, do not believe that defendant is entitled to be resentenced pursuant to the amended version of Section 7401. Nevertheless, Judges Reilly and MacKenzie acknowledge that, since Schultz was decided, the Supreme Court, in lieu of granting leave to appeal, has repeatedly vacated rulings of this Court and remanded for resentencing in accordance with Schultz. See, People v Hamp, 437 Mich 865 (1990), and other cases reported at 437 Mich 865-867 (1990). Accordingly, in the

interests of fairness and judicial economy, Judges Reilly and MacKenzie reluctantly concur in the decision to grant resentencing in accordance with Schultz.

APPENDIX D

MICHIGAN SUPREME COURT

ORDER
Entered: January 29, 1992

92636 & (77)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 92636
COA: 111978
LC: 87-001555-FH

ALAN MICHAEL STONE,
Defendant-Appellee.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for bond also is considered, and it is DENIED.

Brickley, Boyle and Riley, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1992 /s/ Corbin R. Davis
Clerk

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

NO. 91-1732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

MARTIN HOWARD SAMMONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE INTERESTS THE CONFRONTATION CLAUSE PROTECTS, TO ENSURE THE RELIABILITY OF EVIDENCE, SHOULD APPLY AT A MICHIGAN HEARING WHERE THE DEFENSE OF ENTRAPMENT IS LITIGATED BEFORE A TRIER OF FACT.

II. WHETHER THE MICHIGAN COURT OF APPEALS WAS CORRECT IN HOLDING THAT EVEN IF THERE WERE LEGITIMATE CONCERNS FOR THE SAFETY OF THE INFORMANT, THE TOTALITY OF RESTRICTIONS ON CROSS-EXAMINATION, WHICH COMPLETELY FORECLOSED THE DEFENSE FROM DISCOVERING THE IDENTITY OF THE KEY PROSECUTION WITNESS, WHICH TOTALLY FORECLOSED THE DEFENSE FROM INDEPENDENTLY INVESTIGATING THE CREDIBILITY AND VERACITY OF THAT WITNESS, AND WHICH PREVENTED BOTH THE DEFENDANT AND THE TRIER OF FACT FROM EVEN SEEING THE FACE OF THE KEY PROSECUTION WITNESS, SIMPLY WENT TOO FAR.

III. WHETHER THE PROSECUTION SHOULD BE PERMITTED TO HAVE THE EXCLUSIVE MEANS OF INDEPENDENTLY INVESTIGATING THE CREDIBILITY OF AND VERIFYING THE TRUTHFULNESS OF THE TESTIMONY OF PROSECUTION WITNESSES.

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COUNTERSTATEMENT OF THE CASE

Respondent Martin Sammons was convicted of possession with intent to deliver between 225 and 650 grams of a mixture containing cocaine, and conspiracy to deliver the same 225 to 650 grams of a mixture containing cocaine, after a jury trial held June 28 and 29, 1988, in Bay County (Michigan) Circuit Court, the Honorable William J. Caprathe presiding. On September 6, 1988, Mr. Sammons was sentenced to 20 to 30 years in prison for possession with intent to deliver cocaine, plus a mandatorily consecutive 20 to 30 year sentence for conspiracy to deliver the same cocaine.

Respondent raised the defense of entrapment, and an extensive pretrial entrapment hearing was held before the trial court from May 4 through June 7, 1988.[1] The entrapment hearing was held jointly with the entrapment hearings for codefendants Alan Stone and James Wallace.

Mr. Sammons testified in support of his defense of entrapment. The key prosecution witness against Respondent's claim of entrapment, known only as "Confidential Informant Rick", testified at the entrapment hearing and despite repeated defense requests for disclosure of his identity, was allowed to testify without having to disclose to the defense or the court his real name, address,

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[1] Michigan is among the minority of states which follows the so-called "objective" test of entrapment. People v Turner, 390 Mich 7; 210 NW2d 336 (1973); People v Juillet, 439 Mich 34; 475 NW2d 786 (1991). In Michigan, the defense of entrapment is not presented to the jury at trial but is decided by the trial judge at a separate entrapment hearing, usually, although not necessarily, before trial. People v D'Angelo, 401 Mich 167; 257 NW2d 655 (1977).

where he worked, or any other "identifying information". Moreover, despite defense objection, he was allowed to testify at the entrapment hearing wearing a ski mask to hide his face and any facial expressions. Any questions that might directly or indirectly lead to the defense discovering his name or any other "identifying information" were barred. The Court denied repeated defense motions to reveal the face and identity of the masked witness. It repeatedly sustained the prosecution's objections to areas of questioning not even related to identity, whenever the prosecution would claim an answer to a particular question might help the defense indirectly discover the identity of this masked witness.

Mr. Sammons claimed that "Rick" entrapped him by persistently calling him and his family day and night for weeks, at least 50 to 70 times, with appeals to sympathy that "Rick's" life might be in danger from others if he did not find some drugs, with appeals to Mr. Sammons' cocaine addiction that he would be given cocaine if he helped "Rick", and finally ending in threats to Mr. Sammons' own safety if he did not help "Rick" come up with some drugs.[2]

All three codefendants had previously seen "Rick". However, Mr. Sammons testified he did not know "Rick's" real name or where he lived, but only knew his first name from having used drugs with him on a few occasions in the Detroit area. Moreover, he did not

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[2] The Michigan Court of Appeals below held that absent "Confidential Informant Rick's" testimony, Mr. Sammons had carried his burden of establishing entrapment under Michigan law by a preponderance of the evidence.

know with the ski mask on if the witness was the same person he knew as "Rick".

Despite numerous defense objections, the true identity of "Confidential Informant Rick" was never revealed to the defense (or to the court), either before the hearing or in court. "Rick" was called by the prosecution at the hearing and allowed to testify over objection wearing a ski mask to cover his face and hide his identity. "Rick" was not viewed face-to-face by the Court or the defendants while he was testifying. His real name was never revealed to the defense or even to the court. Moreover, defense requests or cross-examination seeking more complete information about the secret witness (short of identifying him) were repeatedly rebuffed, controlled, or limited by the efforts of the prosecution.

The prosecution first claimed that "Rick's" identity need not be disclosed because he was a confidential informant and this was an entrapment hearing and not a trial. The prosecution's other justification for not revealing "Rick's" real name or face were alleged threats to "Rick's" safety, allegedly made by codefendants Wallace and Stone. The prosecution attempted to establish these alleged threats to "Rick" through a second confidential informant, who was also allowed to testify wearing a ski mask and without revealing his name. The Court would also not allow questions of this witness regarding a possible motive he had to make up these threats in an effort to protect his friend "Rick's" identity. Mr. Stone and Mr. Wallace denied ever making any threats.

The police set up a phone call to try to confirm the alleged threats, which they tape recorded. They ended up taping only one

side of the telephone conversation, which revealed no threats. There was no evidence any alleged threats were ever followed up on, despite codefendants Stone and Wallace being out on bond during that period. Moreover, the alleged threats, if believed, appeared directed not really toward "Rick" as much as toward police officer John Buczek, who testified at the hearing without a mask.[3]

Whether or not the threats existed, there was no evidence that Respondent Martin Sammons was involved in or knew of any of the alleged threats.

The Court ruled that a "preponderance of the evidence" favored nondisclosure of "Confidential Informant Rick's" identity. The Court therefore allowed him to keep his ski mask on during his testimony, and prevented Respondent from asking any question which might lead to his name, address, identity, or anything that might directly or indirectly lead to his identity -- even specific dates of the search of his house, his prior offenses, or his date of his most recent conviction and scheduled sentencing.

In a pretrial motion for discovery, counsel asked for discovery of any information in possession of the prosecution or police agencies, which might lead to impeachment of any government witness, or any information which might suggest or support a defense. In addition, the defense asked for information regarding the confidential informant including: Full name, any aliases used,

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[3] Although this witness testified that the alleged threats to "Rick's" safety surfaced in March of 1988, in December of 1987 the prosecutor at the preliminary examination refused to disclose the name of the informant, citing threats to the informant's safety before any evidence of threats apparently existed.

address, phone number, criminal history, employment history, pending charges, criminal investigations involving him, any offers or suggestions of leniency, any plea agreements or negotiations, benefits offered or given to them from police agencies or prosecutors, and information on any aid given by him to police or prosecutors. Defense counsel stated that the requested information was necessary for proper investigation and preparation of a defense of this matter. [Respondent Stone's Motion for Discovery and Inspection, filed 3/25/88].

The Bay County Prosecutor filed a response but failed to address the question of whether it knew of any evidence that the defendant could possibly used as a matter of defense, such as entrapment. With regard the confidential informant, the prosecution stated it would not voluntarily release his name, aliases, address, phone number, employment history, pending charges, or plea agreements or negotiations that were not related to the informant's role in the investigation of defendants Sammons, Stone and Wallace.

While the prosecution disclosed what it claimed to be the informant's prior conviction record, the prosecution refused to disclose the nature of any other pending charges against the witness. The prosecution stated that other information the defense requested was "irrelevant" or "unrelated", and refused to disclose it. Neither the defense nor the court had any way of verifying whether that information was "irrelevant" or "unrelated", because the prosecution never disclosed what that information was and never

disclosed the informant's name to allow anyone else to independently investigate its claim.

At the entrapment hearing, for almost four days, "Rick" and police officers falsely denied that any promises were made in exchange for his cooperation. Only at the very end of the hearing was it revealed that the police had told "Rick" that although nobody got out of charges completely, the more the person did and the better job they did, the more the police would talk to the prosecutor on that person's behalf, and that the prosecutor would make the final decision as to what charges would be brought.

At the conclusion of the hearings, the trial judge denied Respondent's Motion to Dismiss on the ground of entrapment, in essence making credibility determinations in favor of the masked unidentified witness.

Respondent appealed his convictions and sentences as of right to the Michigan Court of Appeals. The Court of Appeals reversed and remanded for a new entrapment hearing, holding that Respondent was denied his right to confront the key witness against him when the prosecution's key witness at the entrapment hearing was allowed to testify while wearing a ski mask and without disclosing his name, address, where he worked, or any other information that might directly or indirectly lead to the defense discovering his identity. People v Sammons, 191 Mich App 351; 478 NW2d 901 (1991). In addition, the Court stated that it would be fundamentally unfair and contrary to principles of due process to allow the state to present evidence designed to defeat a defendant's claim of

entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence. Id., at 362.

The Court of Appeals recognized that a trial court has discretion to place some limits on cross-examination where questions "are merely intended to harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness." Id., 191 Mich App at 367. However, the Court noted that the extent of such restrictions is not unlimited, and that a defendant may be prejudiced when the restrictions deny the defendant the ability to "place the witness in his proper setting". Id., 191 Mich App at 367.

The Court of Appeals recognized that a trial judge may be justified in limiting cross-examination into certain areas in light of threats, where there is both sufficient reason for nondisclosure and the defendant is possessed of other sufficient information with which to place the witness "in his proper setting." However, the Court found that what occurred in the present case was not merely a reasonable limitation on identifying information but a "total foreclosure" of identifying information, which constituted a "preclu[sion of] all such cross-examination altogether". People v Sammons, supra, 191 Mich App at 366-367. Moreover, the court noted that the trial court failed to make any findings whether Respondent possessed sufficient information in which to "place the witness in his proper setting". The Court of Appeals that absent such findings, the trial court's total foreclosure of identifying information "effectively emasculated" Respondent's right of cross-examination. People v Sammons, supra, 191 Mich App at 367-368.

Furthermore, the Court of Appeals held that the masking of the key prosecution witness further denied Respondent his right of confrontation, because the masking of the witness interfered with the trier of fact properly assessing the demeanor of the witness, because face to face confrontation was denied and the rest of the procedures employed failed to ensure the reliability of the testimony.

The Court of Appeals found that absent Confidential Informant Rick's testimony, Mr. Sammons had carried his burden of establishing entrapment under Michigan law by a preponderance of the evidence. The Court of Appeals remanded the case for a new entrapment hearing consistent with the opinion, still leaving the trial court with the power to place necessary limitations on cross-examination, short of total foreclosure of all identifying information, at the hearing.

The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal that decision, with three of the seven Justices writing that they would have granted leave to appeal.

Respondent respectfully asks this Court to deny the Petition for Certiorari filed by the Bay County Prosecutor in this matter, for the reasons stated below.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals did not err in holding that the same interests the Confrontation Clause protects, to ensure the reliability of evidence, should also apply at a Michigan entrapment hearing, which is not functionally different from a bench trial where the issue of entrapment is raised. Moreover, the Court held that whether or not the Confrontation Clause applies, principles of due process and fundamental fairness would demand the same result.

This Court has held for the past 60 years that the starting point in being able to confront an adverse witness is to know who that witness is and where he comes from. As this Court stated in Smith v Illinois, 390 US 129, 131; 88 SCt 748; 19 LEd2d 956, 959 (1968):

> "...when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

Smith was based on this Court's decision in Alford v United States, 282 US 687, 691-693; 51 SCt 218; 75 LEd 624, 627-628 (1931), which recognized that cross-examination of a witness is a matter of right, and that among its core purposes is so that **independent** testimony may be sought and offered concerning the witness's reputation for veracity in his own community.

No decision of this Court or any other court has ever permitted a trial court to allow a crucial witness called by the

prosecution against the accused to testify without revealing his or her name and face. This Court recognized in Lee v Illinois, 476 US 530, 540; 106 SCt 2056; 90 LEd2d 514, 525 (1986), that a basic purpose of confrontation is to promote the perception of fairness in an "open and even" contest between the accused and accuser, and ensures that "convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals."

Exceptions to the Smith/Alford rule may allow a witness in certain circumstances to keep secret his or her home address or place of business, but have never been interpreted to allow a key prosecution witness to testify without revealing his name and face. United States v Alston, 460 F2d 48, 53 (5th Cir, 1972).

This is not a case where the trial court placed reasonable restrictions on the right of confrontation in light of concerns for the witness's safety, such as a restriction on revealing the witness's home address. Rather, the trial court completely precluded the defense from independently investigating the credibility and veracity of the key prosecution witness against Respondent, and completely denied the defense any means to independently verify that anything stated by this witness was true. In fact, because the trial court allowed the witness to remain masked while testifying, the defense was denied the ability to determine if the person who testified was even the person he claimed to be. Nowhere has an appellate court approved such a package of total restrictions that has prevented a person accused of a crime from learning the name of and seeing the face of the key witness called by the prosecution to testify against him or her.

In addition to the restrictions on meaningful cross-examination, the masking of the witness denied Defendant the right to face-to-face confrontation of the witness against him. Coy v Iowa, 487 US 1012; 108 SCt 2798; 101 LEd2d 857 (1988); Maryland v Craig, ___ US ___; 110 SCt 3157; 111 LEd2d 666, 681 (1990). The masking prevented not only the defendant but the trier of fact from viewing the face of the witness in order to assess his facial expressions and demeanor while testifying. Moreover, the masking of the witness not only interfered with the judge's perception of the witness's demeanor, but may also have distorted the rest of the demeanor the witness exhibited. Cf. Coy, supra, 101 LEd2d at 866. A person who knows that no one will be able to find out his identity or see his face, who knows that the opposing party will be not be able to question him question him about the most revealing details of his life or past actions, may feel free to lie and as a result may exhibit one type of demeanor and "body language" when testifying behind a cloak of secrecy. But that person may display a markedly different demeanor when he has to testify with the judge and the person he is accusing looking at him face-to-face, knowing he is subject to full cross-examination about the hidden details of his life, and to possible discovery if he lies.

The Michigan Court of Appeals carefully balanced the competing concerns in this case, and found under the circumstances that the total preclusion of any inquiry into anything remotely related to the key prosecution witness's identity, coupled with the masking of the witness, simply went too far. The Court of Appeals found that the trial judge may have been justified in limiting cross-

examination into certain areas, but that total preclusion went too far, and the masking of the witness interfered with the trier of fact's ability to adequately assess the witness's demeanor.

The Court of Appeals was correct in its conclusion that the total cloak of secrecy placed over the key witness against Respondent at this entrapment hearing denied him the ability to meaningfully confront that witness. As the Court of Appeals noted, what occurred in this case was not merely a reasonable limitation on cross-examination on noncrucial identifying information, but was a "total foreclosure" of identifying information, which "precluded all such cross-examination altogether", and "'effectively emasculated' defendant's right of cross-examination". People v Sammons, 191 Mich App at 366-367.

This Court recognized in Dennis v United States, 384 US 855, 873; 86 SCt 1840; 16 LEd2d 973, 985 (1966), that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Yet the totality of the restrictions in the present case placed the prosecution in absolute control of the access to all relevant information, so that the defense was completely unable to independently investigate or verify any claims made by the witness or the prosecution.

The masking of the witness's identity prevented Respondent from exploring many significant areas for potential cross-examination. The restrictions on identifying information prevented the defense from discovering whether the witness had a more extensive prior criminal conviction record than the prosecution disclosed. The restrictions prevented the defense from discovering

whether there were undisclosed pending charges that were dismissed as a result of the witness's cooperation with police or the prosecution, or for which the witness reasonably expected he might receive leniency in exchange for his cooperation or testimony. The restrictions prevented the defense from independently investigating the informant in his community to see if he had a reputation as someone who might perjure himself to get himself out of trouble, or who would go to whatever reprehensible means were necessary to extricate himself from his problems. The prosecution in this case only disclosed what it believed was relevant to the charges against Respondent in this case, but there may have been a great wealth of other information that the prosecution did not disclose which the defense may have been able to use in cross-examining the witness or in attacking the witness's credibility. Moreover, the restrictions prevented the defense from discovering if the prosecution was truthful and complete in disclosing the limited information it did give. See e.g. Napue v Illinois, 360 US 264; 79 SCt 1173; 3 LEd2d 1217 (1959); Giglio v United States, 405 US 150; 92 SCt 763; 31 LEd2d 104 (1972).

Our founding fathers established a right of confrontation in the Bill of Rights to protect us from these very abuses -- the government using secret, unchallengeable witnesses against an accused person. If the right of confrontation is to have any meaning, it should require a key witness called by the government against the accused to reveal his name and testify without a mask.

The record, as it stands now, is inadequate for this Court to determine if something significant in this informant's past was

hidden from the defense and the trial court at the initial hearing. This Court should deny review so that the trial court will have the opportunity to make that determination.

REASONS FOR DENYING THE WRIT

In the present case, the key prosecution witness against Respondent's claim of entrapment was allowed to testify without ever revealing his face, his name, his address, or any other significant identifying information. He wore a ski mask to cover his face. He refused to give his name. He refused to disclose either his current place of residence or his residence at the time of his involvement as an informant. He refused to uncover his face so that the defense could see if he was the same person who instigated the drug deal in question or was an impostor.

If the constitutional right of confrontation, US Const Am VI, XIV; has any meaning, it requires that a witness called by the prosecution cannot testify behind a cloak of almost total secrecy. It requires that the prosecution not control the sources of information that may be used to challenge the credibility of their own witnesses. It requires that at a bare minimum the witness give his or her name. It should also require that the witness confront the defendant face to face, so the defendant can look at the witness against him, and so the trier of fact can assess the witness's demeanor during his testimony.

Just one of these restrictions would be a significant constitutional violation. In this case, however, not just one but all of these aspects of confrontation were curtailed. The cumulative effect of these restrictions, the total cloak of secrecy that the Court allowed to be placed over this witness, denied

Respondent his constitutional right to meaningfully confront the key witness against him in this case.

A. **THE MICHIGAN COURT APPEALS WAS CORRECT IN HOLDING THAT THE RIGHT OF CONFRONTATION SHOULD APPLY AT A MICHIGAN ENTRAPMENT HEARING, WHICH IS NOT FUNCTIONALLY DIFFERENT FROM A BENCH TRIAL LIMITED TO THE DEFENSE OF ENTRAPMENT. MOREOVER, PETITIONER HAS NOT CHALLENGED THE STATE COURT'S ALTERNATIVE BASIS FOR ITS HOLDING, THAT EVEN IF THE SIXTH AMENDMENT DID NOT APPLY TO SUCH HEARINGS, PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS WOULD DEMAND THE SAME RESULT.**

Petitioner first takes the position that the right of confrontation is only a trial right, and that because under Michigan law the defense of entrapment must be raised at a separate evidentiary hearing before the trial court, the right of confrontation does not apply.[4]

The only reason the prosecution is raising the question of whether the right of confrontation applies during a hearing to determine an entrapment claim is because Michigan, unlike the majority of jurisdictions, has adopted the so-called "objective" test of entrapment, which is decided by the trial court at a separate hearing and not by the jury at trial. People v D'Angelo, 401 Mich 167, 176-177; 257 NW2d 655 (1977).

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[4] Petitioner presents the question as whether the Sixth Amendment Confrontation Clause applies to pretrial hearings. It should be noted that Michigan law does not require an entrapment hearing to be held before trial, although in most cases it is.

In a majority of jurisdictions, including the federal system, the defense of entrapment is an issue litigated at trial as a matter of defense. There, the defendant must prove that the government engaged in reprehensible behavior that instigated the crime, and that the defendant was not predisposed to commit the crime. Since the entrapment claim is litigated before the trier of fact at trial in such cases, the right of confrontation clearly applies -- whether the entrapment claim is decided by a jury or by a judge at a bench trial. Michigan's entrapment hearing is most similar to a bench trial on the issue of entrapment. The same reasons why the right of confrontation applies at a bench trial in United States District Court where entrapment is raised as a defense, apply to Michigan's entrapment hearing as well -- to ensure the reliability of the findings of fact and to ensure that there is rigorous adversarial testing of the credibility of witnesses. There is no significant functional difference so that the right of confrontation should apply to one procedure but not the other.[5] These same concerns apply whether the hearing is labeled a "hearing" or a "bench trial".

In this case, the Michigan Court of Appeals carefully examined this Court's opinion in Kentucky v Stincer, 482 US 730; 107 SCt 2658; 96 LEd2d 631 (1987). The Court noted that while a Michigan entrapment hearing "may not be a criminal prosecution involving the assessment of guilt or innocence, it remains, like a criminal

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[5] The Sixth Amendment does not specifically limit the right of confrontation to "trials". It states that it applies "[i]n all criminal prosecutions".

trial, adversarial in nature and requires the resolution of factual issues by a trier of fact." The Court concluded that the interests involved in ensuring the reliability of evidence at trial also apply to an entrapment hearing. The Court noted that to the defendant a fair resolution of an entrapment claim is normally more critical than the trial itself, because that person has essentially conceded commission of the offense. Moreover, unlike the situation in Stincer, a defendant in Michigan may not renew entrapment at trial. The Court of Appeals held that to deny the defendant the right of confrontation at a Michigan entrapment hearing would be to deny him "the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent trial and conviction, 'is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.'"

In this regard, it may be helpful to examine the way this Court has treated the so-called "informant's privilege", which allows a person who supplies the government with a tip to prevent disclosure of his or her identity.

In Roviaro v United States, 353 US 53; 77 SCt 623; 1 LEd2d 639 (1957), this Court held that the applicability of that privilege depends on the particular circumstances of each case, and the underlying purpose of the privilege, but:

> "Where the disclosure of an informer's identity, or of the contents of his communication, **is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause**, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the

information, dismiss the action." [Emphasis added]. Roviaro, 353 US at 60-61.

This Court held that a balance must be struck, depending on:

"...the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro, 353 US at 62.

In McCray v Illinois, 386 US 300; 87 SCt 1056; 18 LEd2d 62 (1967), this Court held that the state was not required, at a preliminary hearing to determine whether the police had probable cause to arrest or search, to disclose the identity of the tipster who provided them with the tip. Contrasting Roviaro, the Court in McCray noted that in Roviaro, the informant had taken a "material part in bringing about the possession of certain drugs by the accused, [and] had been present with the accused at the occurrence of the alleged crime", McCray, supra, 386 US at 309-310.

Significantly, both Roviaro and McCray point out that when the informant's knowledge is relevant to the question of **entrapment**, the balance favors disclosure of the witness's identity. Roviaro, supra, 353 US at 64; McCray, supra, 386 US at 310. See also United States v Gomez-Rojas, 507 F2d 1213, 1219 (5th Cir, 1975).

An entrapment hearing is not like a hearing to determine whether the police had probable cause to search or arrest a witness. In such suppression hearings, the informant generally need not be disclosed because a determination of whether the police had probable cause deals with what the police knew at the time, which may be based on hearsay. The police can be cross-examined on why they believed their underlying information was reliable and why

the informant was credible. Even in those circumstances, disclosure is sometimes required.

Here, however, the very credibility of this participant was the key issue at the entrapment hearing. Respondent claimed the informant entrapped him with persistent phone calls day and night for weeks, concerns for the safety of the informant and later himself, and by taking advantage of Respondent's se ere cocaine addiction with offers of drugs. "Rick's" version of the telephone conversations was completely different than Respondent's. The court had to make a credibility determination whether to believe the unknown government informant or Respondent. Given the nature of the defense, the extensive involvement of the informant, and the importance of his testimony, all factors supported the disclosure of this witness's identity and meaningful confrontation with him.

The government cannot "have it both ways". While the government may have a privilege in some circumstances to withhold from the defense the identity of a confidential informant they do not plan to call, once they actually choose to use that informant as a witness, they have no right to withhold the identity of that witness. The right of confrontation was designed so that the state would not be able to hide the identity of those intimately and extensively involved in instigating and inducing criminal activity on the government's behalf. It was designed to prevent the prosecution from calling secret witnesses on their behalf.

The Michigan Court of Appeals did not err in applying the right of confrontation to the unique situation presented under Michigan law, which, unlike most states, provides for a separate

"bench trial" type proceeding to resolve the claimed defense of entrapment. At a Michigan entrapment hearing, like a federal bench trial concerning an entrapment claim, testimony is taken, credibility determinations are made, the trial court makes findings of fact as the trier of fact, and applies the law to those findings to reach a decision on whether the defense is proven. There is no reasoned distinction why the right of confrontation should apply to one but not the other, simply because one is called a "trial" and the other a "hearing", when the language of the Sixth Amendment makes no such distinction.

Moreover, the Michigan Court of Appeals did not merely rely on the Confrontation Clause to reach its decision. Rather, it also relied on principles of due process and fundamental fairness to reach its conclusion in this case:

> "Finally, we believe that it would be fundamentally unfair and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." People v Sammons, supra, 191 Mich App at 362.

Petitioner has limited its first question only to whether the Sixth Amendment "Confrontation Clause" applies to pretrial hearings. It has not raised the question before this Court whether due process and principles of fundamental fairness allow the state to present evidence designed to defeat an entrapment claim and at the same time to restrict the defendant's ability to effectively challenge that evidence. Thus, even if this Court were to decide that the right of confrontation does not apply to pretrial

hearings, the prosecution has not challenged the ruling below that principles of due process of law and fundamental fairness would demand the same result.

B. THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT EVEN IF CONCERNS FOR THE SAFETY OF THE INFORMANT WERE LEGITIMATE, THE COMPLETE FORECLOSURE OF CROSS-EXAMINATION AS TO HIS NAME, ADDRESS, OR ANY INFORMATION THAT MIGHT LEAD TO HIS IDENTITY SIIMPLY WENT TOO FAR, BECAUSE THE RESTRICTIONS COMPLETELY PRECLUDED RESPONDENT FROM INDEPENDENTLY INVESTIGATING THE INFORMANT'S CREDIBILITY AND VERACITY.

The starting point in being able to meaningfully confront an adverse witness is to know who that witness is and where he comes from. In Smith v Illinois, 390 US 129; 88 SCt 748; 19 LEd2d 956 (1968), the principal prosecution witness testified he had purchased heroin from the defendant in a restaurant. Part of his testimony was corroborated by police officers, but only this witness and the defendant testified as to the crucial events in question, and their versions were entirely different. On cross-examination, the witness admitted the name he gave was not his real name. When asked what his correct name was and where he lived, the Court sustained the prosecution's objections. Although the defendant and his lawyer knew the witness, there was no evidence that either the defendant or his attorney knew his correct name or where he was living at the time of trial.[6]

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[6] This factual scenario is remarkably similar to the instant case, where Respondent had met "Rick" before, but did not know his real name or where he lived.

On appeal, this Court reversed the defendant's conviction, finding a fundamental violation of his right of confrontation:

> "...when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." Smith v Illinois, 390 US 129, 131; 88 SCt 748; 19 LEd2d 956, 959 (1968).

Smith followed the opinion of this Court in Alford v United States, 282 US 687; 51 SCt 218; 75 LEd 624 (1931). In Alford, the trial judge sustained objections to questions by the defense seeking to elicit the "place of business" of a prosecution witness, a former employee of the accused. This Court unanimously reversed the conviction, finding a denial of the right of confrontation. This Court stressed that one essential purpose of requiring a witness to disclose his address or place of business is so that the defendant may independently investigate the witness' reputation for credibility in the community:

> " Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood...
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> * * *
>
> "The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." [Citations omitted]. Alford v United States, 282 US 687, 691-693; 51 SCt 218; 75 LEd 624, 627-628 (1931).

In Lee v Illinois, 476 US 530, 540; 106 SCt 2056; 90 LEd2d 514, 525 (1986), this Court explained that a core purpose of confrontation is to promote the perception of fairness in an "open and even" contest between the accused and accuser:

> "The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals."

Here, counsel for the accused had absolutely no way of launching an independent investigation into the secret witness's credibility and reputation for veracity, as he was precluded from asking who this person was, where he was from, who his associates were in the past or present, or even what he looked like. This witness truly was unchallengeable.

The prosecution did disclose what they claimed was the witness's prior criminal conviction record. However, the prosecution refused to disclose a great deal of other information requested by the defense. They refused to disclose the nature of all charges that had been pending against the witness when he began to work for the police, stating the other charges were irrelevant to this charge. They refused to disclose any other forms of leniency the witness may have received from the prosecution in other cases. They refused to give the defense the basic information so that the defense could investigate the witness through a search of court records or police records, or questioning of associates. The prosecution completely controlled what was "relevant" and what was not "relevant" in this case.

Moreover, the defense had no way of verifying whether the very limited information the prosecution supplied was accurate or complete. See Napue v Illinois, 360 US 264; 79 SCt 1173; 3 LEd2d 1217 (1959); Giglio v United States, 405 US 150; 92 SCt 763; 31 LEd2d 104 (1972).

The total cloak of secrecy as to this witness's name, face, address, employment, associates, and the court's restrictions on anything that could even indirectly point to his identity, placed the defense at the mercy of the prosecution to provide it with the information it needed to attack the credibility of the prosecution's key witness. Yet this Court has stated:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Dennis v United States, 384 US 855, 873; 86 SCt 1840; 16 LEd2d 973, 985 (1966).

The cloak of secrecy placed over "Secret Witness Rick's" identity prevented Respondent from effectively and independently investigating "Rick's" background and credibility. Counsel specifically asked for disclosure of the witness's name so that he could independently investigate the witness's reputation for veracity, but the Court refused. As a result, Respondent was clearly denied of the essence of confrontation -- he was denied any meaningful opportunity to investigate and challenge the credibility of the key witness against him.

The justification given for the drastic measures taken to place a cloak of secrecy around "Confidential Informant Rick" were the prosecution's concerns for his safety, based on alleged threats

to kill or seriously harm "Rick". The evidence the prosecution claimed established a serious threat to "Rick's" safety was based entirely on the testimony of a second masked unnamed witness the prosecution called. The prosecution testimony was replete with contradictions as to who even made the threat, statements that it wasn't really "Rick" they wanted, and a tape recorded phone call designed to confirm the alleged threat that disclosed no threat.[7] The persons this masked witness claimed made the threats testified and denied ever making them. They claimed the "threats" were a complete fabrication.

But even if threats were made, there was no evidence that Respondent Martin Sammons had any involvement whatsoever in the alleged threats. The threats, if made at all, were communicated by codefendants James Wallace and Alan Stone, while Mr. Sammons was at all times in jail. Mr. Sammons had no involvement in the threats and no means to carry them out. Yet Mr. Sammons, an innocent party with regard to the threats, had his right and ability to meaningfully confront the key witness against him completely cut off because the court found by a mere "preponderance of the evidence" that someone else might have uttered some threats.

More importantly, even if the concerns for the safety of "Rick" were legitimate, the radical measures taken in the name of protecting his safety went way beyond what was necessary or

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[7] The circumstances lead one to believe that the "threats" could have been conveniently concocted so that "Rick's" identity need not be disclosed. The defense was prevented from questioning the witness as to whether he was the one who turned his friend "Rick" in to police, which would have given him a possible motive to help "Rick" out of the predicament "Rick" faced in having to testify.

legitimate to the point of interfering with meaningful confrontation and the reliability of the factfinding process. No case has gone so far to allow such complete restrictions on the disclosure of the name, face, address, or any other identifying information of a key prosecution witness.

While there have been exceptions applied to the rules set down in Smith and Alford, those exceptions have been limited to allowing the witness to refuse to disclose his **address or place of business** in appropriate circumstances. But those exceptions have never been interpreted to allow a key witness to refuse to disclose his **name**. They have certainly not allowed a key prosecution witness to refuse to disclose his name and then hide behind a ski mask in court. These exceptions have never condoned a total cloak of secrecy like the one placed over this witness.

The leading case on the extent of these exceptions is United States v Alston, 460 F2d 48 (5th Cir, 1972). In Alston, a police undercover narcotics agent, whose testimony was critical to the government's case against the defendant, refused to divulge his home address on cross-examination. The Court in Alston, at 51-52, distinguished this Court's opinion in Smith v Illinois, noting that in Smith the witness's failure to disclose both name and address resulted in the defendant not being given sufficient opportunity to place the witness in his proper setting:

> "In Smith, a narcotics case, a Government informer who was allegedly a narcotics addict himself refused to divulge not only his home address but also his real name. Faced with a witness who testified only under an alias and who did not have an existing occupation at the time of the trial, the defense was left with nothing on which to base an effective cross-examination for purposes of

contradiction or impeachment of the Government's primary witness."

In contrast, in Alston, the failure to divulge the witness's present home address on safety grounds did not prevent the defense from the opportunity to engage in a comprehensive exploration of the witness's background. That witness was required to disclose his real name, his address at the time of the offense, his military and past work history, his work history as an undercover agent and the aliases he had used, the name of his work supervisor, and the telephone number he had used in his dealings with the defendant. This disclosure thoroughly "placed" that witness, so that disclosure of his home address would add virtually nothing relevant to what was already known about him.[8]

Distinguishing Smith and Alford, the Court in Alston stated:

> "In Alford and Smith there was a possibility of a **Man in the Iron Mask masquerade**. But Agent Johnson was only permitted to mask his address, a fact difficult to maximize as so important to the defense as to mandate reversal." Alston, supra, at 53.

If any case presented "the Man in the Iron Mask," the instant case did. No one saw the key prosecution witness's face. No one knew his name. No one knew where he lived or where he worked, either in the present or the past. No one, in fact, could tell if the man in the mask sitting on the witness stand was the person who participated in the drug deal.

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[8] Significantly, the Court in Alston noted that there is a greater need to probe into the credibility of informers, who have no official obligation to provide information and may have a far greater motive to fabricate than perhaps any other witness.

In Delaware v Van Arsdall, 475 US 673, 679; 106 SCt 1431; 89 LEd2d 674 (1986), this Court found a denial of the right of confrontation because the restrictions on cross-examination by the trial court effectively foreclosed all inquiry into a relevant event that might reasonably have furnished the defense with grounds for impeachment of a key witness. In the present case, the restrictions on the most basic of inquiries -- the witness's name -- had a similar effect, but foreclosed not merely one but countless areas of impeachment.

Petitioner misleads this Court when it states that the only aspect of confrontation that was denied was the witness's name and face. Had the defense been allowed to ask "Rick" his real name, they may have uncovered other prior convictions or pending charges the prosecution did not disclose to them.[9] They may have been able to discover persons in the community who could state "Rick" had a reputation as a pathological liar who would say anything to get himself out of the predicament he was in, or who was so scared of going to jail he would use any reprehensible tactic he could to make sure a drug deal went down. They may have discovered a perjury charge lurking in Rick's past. They may have uncovered a far greater array of pending charges that "Rick" received leniency for in exchange for his cooperation and testimony. These areas

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[9] As the Michigan Supreme Court has recognized, "rap sheets", LEIN printouts, or even presentence reports are not always accurate in listing a person's criminal record. People v Hendrick, 398 Mich 410; 247 NW2d 840 (1976). Given the circumstances in the present case, where "Rick" falsely testified through 4 days of hearings that no inducements whatsoever had been given for his testimony, the circumstances demanded that the defense have the ability to independently investigate the full extent of his background.

were completely closed off to the defense. The prosecution controlled the only avenues Respondent could use to impeach their witness. The prosecution prevented the defense from acquiring any means to tell if the witness was telling the truth.

The totality of the restrictions placed on Respondent's ability to confront the key witness against him simply went too far. Those restrictions completely precluded the defense from independently investigating the background of the informant. Those restrictions completely precluded the defense from being able to determine if the witness was lying in material aspects of his testimony. The prosecution cannot be allowed to present evidence designed to defeat a claim of entrapment and at the same time restrict the defense's ability to effectively examine the reliability of that evidence. The Michigan Court of Appeals did not err in its conclusion that in the present case, the totality of restrictions simply went too far.

C. RESPONDENT WAS FURTHER DENIED HIS RIGHT TO CONFRONT THE KEY WITNESS AGAINST HIM, WHEN THE COURT ALLOWED THE WITNESS TO TESTIFY WEARING A SKI MASK TO COVER HIS FACE AND THE OTHER PROCEDURES FAILED TO ENSURE THE RELIABILITY OF THE EVIDENCE.

Not only was the defense prevented from knowing the identity of the key prosecution witness, but the witness was allowed to testify with his face concealed at all times inside a ski mask. The defense attorneys argued that this was a violation of the right to confront the witness, when the credibility of that witness was material to the case. The prosecutor argued that the mask did not

interfere with the right of confrontation, stating confrontation simply requires the opportunity to ask questions of a witness and hear their answers. This assertion was patently incorrect.

This Court had occasion to consider the meaning of "confrontation" in Coy v Iowa, 487 US 1012; 108 SCt 2798; 101 LEd2d 857 (1988). This Court held that a screen erected to prevent a child witness from viewing the defendant she had accused of sexual assault, which also partially prevented the accused from seeing her when the witness testified, was a denial of the right of confrontation. The Court held that the Constitution normally requires face to face confrontation, and the use of a screen to prevent such face to face confrontation required reversal of the defendant's conviction:

> "...[The Confrontation Clause] confers at least 'a right to meet face to face all those who appear and give evidence at trial.'"
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> * * *
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> " We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v Iowa, 101 LEd2d at 864.

This Court in Coy traced the roots of the right of face to face confrontation back to the very beginnings of Western legal culture. This Court deemed face to face confrontation important, because "it is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" Id, at 866.

In Maryland v Craig, ___ US ___; 110 SCt 3157; 111 LEd2d 666, 681 (1990), this Court reaffirmed the importance of face to face confrontation, but held that although there is a strong preference for face to face confrontation, it is not always an indispensable

element of the right to confront one's accusers. However, this Court held that if face to face confrontation is denied, any procedure used must ensure the reliability of the evidence by subjecting it to rigorous adversarial testing and must serve to preserve the essence of effective confrontation. Maryland v Craig, supra, 111 LEd2d at 686; People v Sammons, supra, 191 Mich at 363.

In the present case, the procedures employed failed miserably in ensuring the reliability of "Rick's" testimony.

In the present case, although "Confidential Informant Rick" could apparently see Defendant's face through the eyeholes of his ski mask, Respondent could not see the face of his accuser. The mask made it easier for "Rick" to lie, because he knew no one could see his face or his expressions when he testified. This included the Court, which had to assess his credibility in ruling on the entrapment question. If anything, this was more harmful than the lack of "confrontation" in Coy. At least in that case the trier of fact could see the witness's face to assess her credibility.

> "It has been said that the human face is the index to character and that facial expressions cross all language barriers. The facial expressions of a witness may convey much more to the trier of the facts than do the spoken words." United States v Walker, 772 F2d 1172, 1179 (5th Cir, 1985).

Demeanor evidence is of "utmost importance" in the determination of the credibility of a witness. A witness's facial expressions and demeanor are often more reliable than the literal meaning of the witness's words. People v Dye, 431 Mich 58, 64-65; 427 NW2d 501 (1988).

Moreover, the fact that a witness is allowed to testify without showing his face and without revealing his identity may very well distort the other "body language" or demeanor evidence the witness displays. A person who knows that no one will be able to find out his identity or see his face, who knows that the opposing party will be not able question him about the most revealing details of his life or past actions, who knows he can lie at will with little chance of being caught, may exhibit one type of demeanor and "body language". But if that same person has to show his face, tell everyone who he is, and knows he will be subject to full detailed cross-examination about himself and his past, and that any lies he tells could possibly be discovered, that witness may show a markedly different demeanor. Thus the masking of the witness and his identity not only interfered with the trier of fact's perception of his demeanor, but could very well have distorted the substance of that demeanor itself. Cf. Coy, supra, 101 LEd2d at 866.

Finally, because he was masked, for all we know the person on the witness stand wearing the ski mask may not even have been the same person who Respondent knew as "Rick", but an impostor placed there to assume his role. When asked if he could tell whether the unknown person testifying was the same person as he knew as "Rick", Respondent testified "not with that mask on". Respondent had the right to confront the witness face to face, at least to see if that witness was indeed the same person.

The Michigan Court of Appeals below held that the combined effect of masking the witness and allowing him to testify without

revealing his name, address, place of business, or any other information that could lead to the defense identifying who he really was "'effectively emasculated' defendant's right of cross-examination". People v Sammons, supra, 191 Mich App at 368. The Court of Appeals held it was "fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment, and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." People v Sammons, supra, 362.

Thus, the Court of Appeals found that the procedures did not ensure the reliability of the evidence and did not preserve the essence of effective confrontation. Maryland v Craig, supra. If anything, these procedures had the exact opposite effect.

It was bad enough that the defense had no meaningful way to independently investigate and attack the credibility of this witness. (See Part B, supra). The Court's ruling that it was unnecessary to see the witness's face to determine his credibility further prevented the witness's reliability from being assessed in any constitutionally meaningful sense.

In its Petition, the Prosecution tries to ignore that it was a complete cloak of secrecy they were allowed to place over their star witness, and instead tries to attack each restriction as if it were an isolated instance. These restrictions cannot be viewed in isolation. It is clear that the total package of restrictions -- the masking of the witness, the refusal to give his name, his address, place of business, or any other identifying information so that the defense could independently investigate his credibility --

foreclosed Respondent from enjoying any meaningful measure of confronting the key witness against him in this criminal prosecution.

The failure to allow Respondent to view the witness against him face-to-face was an egregious violation of the right of confrontation, in light of the other restrictions that prevented Respondent from effectively confronting this masked unknown witness. Our founding fathers enacted the right of face to face confrontation for the very purpose that secret witnesses would not be used against a person accused of a crime. It may be the prosecution's choice in certain circumstances whether or not to call an informant as a witness, but when they decide to do so, the constitution demands that the defendant be able to confront that witness preferably face to face, and minimally, in a constitutionally meaningful manner.

D. OTHER CONSIDERATIONS FOR DENYING THE WRIT.

The Prosecution in its Petition raises a number of "policy arguments" why this Court should allow masked secret witnesses to testify in drug cases. It wants this court to believe that the so-called drug war will be dealt a serious blow if drug dealers, caught by police and given leniency for their cooperation, are forced to state their names and show their faces when testifying as government witnesses.

The Prosecution's claim is, frankly, preposterous. The drug war will not suffer if this Court requires that the right of

meaningful confrontation must apply at entrapment hearings. Every year, close to 10,000 persons are convicted of delivery or possession of controlled substance offenses in the State of Michigan alone. To Respondent's knowledge, this is the only case where the prosecution has felt it necessary to use a secret masked witness in an attempt to defeat a claim of entrapment. In fact, Respondent is aware of no other case in any jurisdiction where a key witness was allowed to testify under the total cloak of secrecy like the one placed over the informant in this case.

The prosecution is essentially urging that the most basic of constitutional rights, the accused's right to meaningfully confront the witnesses against him or her, must be subordinated to law enforcement needs in the "drug war". Yet the decision of the Court of Appeals will not have any measurable effect on law enforcement. Informants up to now have all known that if they become intimately involved in drugs and end up instigating drug deals in order to get themselves out of trouble, there is a strong likelihood that they will have to testify and reveal who they are at trial. A right of total secrecy has never been recognized for such informants, yet this has not stopped a steady flow of informants from going to the police, trying to extricate themselves from their own difficulties by instigating drug deals on the government's behalf. Moreover, the prosecution has many other methods at their disposal to assure that their informants, whose help they have enlisted, are adequately protected if fearful.

On the other hand, this Court must consider the far-reaching effects of allowing secret or masked witnesses to testify in Court.

In virtually every criminal case where a defendant is charged with a violent or assaultive offense, nearly every witness has some justifiable fear or reluctance to testify. Yet our constitution requires that those witnesses confront the person they are accusing face to face. If we allow witnesses to be masked and refuse to divulge their names whenever they are fearful for their safety, even if that fear is justifiable, our Court system will become a series of Star Chamber proceedings where a person is convicted based on the testimony of secret masked witnesses whose names he does not know.

The Prosecution's Petition conveniently ignores the total picture presented in this case, the cumulative effect these restrictions had on the right of confrontation. It may have been permissible not to require "Rick" to divulge his current home address, as a reasonable restriction that would on balance outweigh the need for that information. But in no stretch of the imagination can the total cloak of secrecy thrown over "Rick" be justified.

Our founding fathers established a right of confrontation in the Bill of Rights to protect us from these very abuses -- the government using secret witnesses against an accused person.

Finally, this Court should consider the very real possibility that something crucial about this witness's background has been hidden in this case. The defense was prevented from independently investigating this possibility at the initial hearing. The trial court had no ability to find out, as it was never told the witness's name.

The Michigan Court of Appeals has remanded for a new entrapment hearing, so that the defense can minimally investigate this possibility. It is now over four years later and any threat, if it existed at all, has certainly dissipated. Moreover, the opinion of the Michigan Court of Appeals still allows the trial court to fashion reasonable restrictions to protect the witness if necessary, as long as the procedures assure the reliability of the evidence. It would be a miscarriage of justice if this secret witness entrapped Respondent through reprehensible actions and lied on the witness stand, but as a result of his cloak of secrecy was allowed to hide significant facts that may have been crucial to the trier of fact in making a fair assessment of his credibility and truthfulness.

The current record is inadequate for this Court to make this determination. Only a hearing will provide us with answers. The decision of the Michigan Court of Appeals provides for such a hearing, and carefully balances the competing concerns.

For these reasons, Respondent asks this Court to deny the Petition for Writ of Certiorari, so that the trial court will have the opportunity to make that determination.

RELIEF REQUESTED

WHEREFORE, for the reasons stated, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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